

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.K., Appellant**

**and**

**DEPARTMENT OF DEFENSE, DEFENSE  
LOGISTICS AGENCY, Fort Belvoir, VA,  
Employer**

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**Docket No. 15-1917  
Issued: January 29, 2016**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 18, 2015 appellant filed a timely appeal from a March 23, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received a \$34,594.18 overpayment of compensation; (2) whether it properly determined that appellant was

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 23, 2015, the date of OWCP's last decision, was September 19, 2015. Since using September 22, 2015, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is September 18, 2015, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$445.05 from appellant's compensation payments every 28 days.

### **FACTUAL HISTORY**

OWCP accepted that on April 9, 1998 appellant, then a 51-year-old production foreman, sustained a low back sprain due to lifting heavy boxes. Appellant received disability compensation on the periodic rolls beginning June 16, 2002 and continuing. Effective February 1, 2009, he began to receive Social Security Administration (SSA) benefits in addition to FECA compensation.

OWCP periodically required appellant to complete EN1032 forms which posed various questions regarding his income, employment and volunteer activities, and earnings. Each Form EN1032 covered the 15-month period prior to the completion of the form and asked appellant to certify that the information he provided was correct.<sup>3</sup> The EN1032 forms specifically requested that appellant report any benefits received from SSA as part of an annuity under the Federal Employees' Retirement System (FERS), but not any benefits received from SSA received due to employment in the private sector. The forms posed the questions, "Do you receive benefits from SSA as part of an annuity for federal service?" On EN1032 forms completed on March 1, 2010, February 9, 2011, February 8, 2012, January 31, 2013, and February 10, 2014, appellant responded "no" in response to this question about whether he received benefits from SSA as part of an annuity for federal service. On a Form EN1032 completed on March 5, 2015, appellant responded "yes" in response to this question and listed the benefits received from SSA as part of an annuity for federal service as being \$2,069.00 per month.

On October 30, 2014 SSA confirmed that appellant received SSA retirement benefits which included benefits based upon his federal service for the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014. The documents detailed the portion of SSA retirement benefits based upon appellant's federal service that should have been offset against FECA compensation. OWCP failed to offset FECA compensation for the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014 to reflect this receipt of SSA benefits based on federal service.

In a December 3, 2014 notice, OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$34,594.18 for the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014. It noted that the overpayment was created because SSA benefits attributable to federal service had not been offset as required against appellant's FECA compensation for these periods.<sup>4</sup> OWCP also made a preliminary determination that appellant was at fault in the creation of the

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<sup>3</sup> Appellant was advised that he might be subject to criminal prosecution if he made a false statement or misrepresentation of a material fact in claiming a payment of benefits under FECA or fraudulently concealed or failed to report income or other information which could have an effect on benefits.

<sup>4</sup> In its December 3, 2014 notice, OWCP provided an extensive discussion of how the overpayment was created during the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014 due to the failure to offset the portion of SSA benefits attributable to federal service. The record contains several worksheets and payment records supporting these calculations.

overpayment because he made incorrect statements as to material facts on EN1032 forms which he knew or should have known to be incorrect. OWCP indicated that on EN1032 forms completed on March 1, 2010, February 9, 2011, February 8, 2012, January 31, 2013, and February 10, 2014, appellant responded “no” in response to a question about whether he received benefits from SSA as part of an annuity for federal service despite the fact that he received such SSA benefits for the periods covered by the forms.

In its December 3, 2014 notice, OWCP further advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the recovery of overpayment. It informed appellant that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the recovery of overpayment. Appellant did not respond to OWCP’s December 3, 2014 notice within the allotted period.

In a March 23, 2015 decision, OWCP finalized the overpayment of compensation in the amount of \$34,594.18 for the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014. It found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP required repayment of the overpayment by deducting \$445.05 from appellant’s continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>6</sup> Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay.<sup>7</sup> FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup> When OWCP discovers concurrent receipt of benefits, it must declare an overpayment of compensation and give the usual due process rights.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116(a).

<sup>7</sup> 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

<sup>8</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

### **ANALYSIS -- ISSUE 1**

The record supports that appellant received ongoing FECA wage-loss compensation commencing June 16, 2002 and continuing and that he received SSA benefits commencing February 1, 2009. The portion of SSA benefits appellant earned as a federal employee was part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>10</sup> Appellant's FECA compensation was not offset until October 19, 2014. SSA notified OWCP of the applicable SSA rates for appellant and their effective dates. Based on these rates, OWCP was able to calculate the dual benefits appellant received during the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014 which yielded an overpayment of compensation in the amount of \$34,594.18. The record includes overpayment worksheets explaining the overpayment calculation. Therefore, OWCP properly determined that appellant received a \$34,594.18 overpayment of compensation.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>11</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>12</sup> No waiver of recover of payment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>13</sup>

In determining whether an individual is not "without fault" or alternatively "at fault" in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

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<sup>10</sup> FECA Bulletin No. 97-9, *supra* note 8.

<sup>11</sup> 5 U.S.C. § 8129(a).

<sup>12</sup> *Id.* at § 8129(b).

<sup>13</sup> *L.J.*, 59 ECAB 264 (2007).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”<sup>14</sup>

Section 10.433(b) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

OWCP determined that appellant was at fault in the creation of the \$34,594.18 overpayment of compensation for the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to October 18, 2014 because he made incorrect statements as to material facts regarding SSA benefits on EN1032 forms which he knew or should have known to be incorrect. It found that, due to this finding of fault, waiver of recovery of the overpayment was precluded.

The Board finds that the evidence of record supports a finding of fault for the portion of the overpayment created during the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to February 10, 2014. On EN1032 forms completed on March 1, 2010, February 9, 2011, February 8, 2012, January 31, 2013, and February 10, 2014, appellant responded “no” in response to a question about whether he received benefits from SSA as part of an annuity for federal service. However, he had in fact received such SSA benefits for February 1, 2009 to December 31, 2011 and January 1, 2013 to February 10, 2014. The EN1032 forms advised appellant of the materiality of correctly reporting income and benefits information and the Board finds that he was aware or should have been aware of the need to report SSA retirement benefits attributable to his federal employment.<sup>16</sup>

Because OWCP properly found appellant at fault for the portion of the overpayment created during the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to February 10, 2014, waiver of recovery of the portion of the overpayment created during these periods is precluded.<sup>17</sup>

The Board further finds that the evidence of record does not support a finding of fault for the portion of the overpayment created during the period February 11 to October 18, 2014. On a Form EN1032 completed on March 5, 2015, appellant responded “yes” in response to this question and listed the benefits received from SSA as part of an annuity for federal service as

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<sup>14</sup> 20 C.F.R. § 10.433(a).

<sup>15</sup> *Id.* at § 10.433(b).

<sup>16</sup> On appeal appellant asserted that he was not at fault in the creation of the overpayment of compensation, but he did not adequately explain the basis for this assertion with respect to the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to February 10, 2014.

<sup>17</sup> *See supra* notes 13 and 14.

being \$2,069.00 per month. Therefore, OWCP improperly found that appellant was at fault for the portion of the overpayment created during the period February 11 to October 18, 2014.

Under 20 C.F.R. § 10.434, when a claimant is without fault in the creation of the overpayment for a given period, OWCP may only recover the overpayment, in accordance with section 8129(b) of FECA,<sup>18</sup> if a determination has been made that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.<sup>19</sup> Therefore, the case shall be remanded to OWCP for further development with respect to whether appellant is entitled to waiver of the recovery of overpayment under these standards for the period February 11 to October 18, 2014.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$34,594.18 and that he was at fault in the creation of the overpayment for the periods February 1, 2009 to December 31, 2011 and January 1, 2013 to February 10, 2014, thereby precluding waiver of recovery of the portion of the overpayment created during these periods. The Board further finds that appellant was not at fault in the creation of the overpayment for the period February 11 to October 18, 2014 and, therefore, the case is remanded to OWCP for further development regarding waiver of recovery of the overpayment for the portion of the overpayment created during the period February 11 to October 18, 2014.

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<sup>18</sup> 5 U.S.C. § 8129(b).

<sup>19</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.436 and 10.437.

<sup>20</sup> Given the Board's disposition of the fault and waiver issues of this case, it is premature to consider whether OWCP properly required repayment of the overpayment by deducting \$445.05 from appellant's compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the overpayment and it is affirmed in part with respect to fault in the creation of the overpayment. The case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: January 29, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board